STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 18, 2008
v	No. 268499 Wayne Circuit Court
KOBEAY QURAN SWAFFORD, Defendant-Appellee.	LC No. 05-010897-01 ON REMAND

Before: Judges Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

In its initial appeal in this case, the prosecution challenged the trial court's dismissal of charges of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227, that had been filed against defendant Kobeay Quran Swafford. In our previous opinion in this case, we reversed the trial court's dismissal of these charges and remanded the case to the trial court. *People v Swafford*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268499). Defendant filed for leave to appeal our decision with our Supreme Court. In lieu of granting leave to appeal, our Supreme Court vacated our decision and remanded the case to us "for reconsideration of the Interstate Agreement on Detainers issue in light of the documentation that the defendant attaches to his application for leave to appeal and motion in [the Supreme Court]." *People v Swafford*, 480 Mich 881; 738 NW2d 233 (2007).[1] After considering our Supreme Court's ruling and the suggestions raised by Justice Corrigan in her concurring statement, we again reverse the trial court's dismissal of the charges against defendant.

I. Factual Background

On April 13, 2004, the Wayne County Prosecutor's Office ("prosecutor's office") filed a complaint charging defendant with the premeditated murder of Dorian Myles, the assault with intent to murder of Sean Phillips, and felony-firearm. On the same day, a warrant was issued for defendant's arrest. In May 2004, defendant was arrested in Tennessee on federal charges of

[1] Our Supreme Court denied leave to appeal in all other respects. *Swafford*, *supra*, 480 Mich 881.

bank robbery. The prosecutor's office sent a detainer against defendant to the United States Marshal for the state of Tennessee on June 1, 2004.[2] Defendant pled guilty to the bank robbery charge and was sentenced to 37 months' imprisonment in a federal penitentiary on November 19, 2004.

At some point, presumably after defendant's sentence was entered, the original detainer presented to the United States Marshal was apparently sent to federal prison authorities. A copy of the detainer originally sent to the Untied States Marshal and later submitted by defendant to our Supreme Court in his motion for leave to appeal bears a notation dated March 2, 2005, and states, "originals ordered and on the way." In a subsequent memorandum, also not included in the lower court record and first submitted by defendant in his application for leave to appeal to our Supreme Court, defendant requested information regarding the status of the March 2 document. In the disposition section of the memorandum form, a federal prison official wrote the following reply:

> I verified the request to lodge a detainer per policy. [R]equest for originals, is normal policy as we need originals for the file, not necessary as the request was verified.

On March 2, 2005, defendant signed a document indicating that representatives of the Federal Bureau of Prisons informed him of the first-degree murder charge pending against him. That day, the federal inmate systems manager also contacted the prosecutor's office, offering to temporarily transfer custody of defendant to state authorities for the purpose of prosecuting the criminal charges filed by the prosecutor's office against defendant. Defendant included in his application for leave to appeal a copy of a request, dated March 2, 2005, asking for final disposition of the first-degree murder charge. He also submitted a document dated March 2, 2005, that informed the prosecutor's office that a detainer had been filed against defendant in the office's favor on the first-degree murder charge and that defendant was scheduled for release from federal prison on February 1, 2007. The prosecutor's office received notice of these documents by certified mail on March 7, 2005.

Defendant submitted another document, dated June 4, 2005, and not included in the lower court record, indicating that a federal inmate systems manager had advised the prosecutor's

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[2] A copy of this detainer, along with several other documents pertinent to this appeal, have not been included in the lower court record and were first submitted by defendant in his motion for leave to appeal our original ruling in this case to our Supreme Court. Because the Michigan Court Rules specify that appeals to this Court are heard on the original record, they prohibit us from expanding the record on appeal. MCR 7.210(A). Similarly, appeals before our Supreme Court are heard on the original record. MCR 7.311(A). However, pursuant to MCR 7.316(A)(4), our Supreme Court has the discretion to "permit the transcript or record to be amended by correcting errors or adding matters which should have been included." We presume that our Supreme Court's order that we reconsider "the Interstate Agreement on Detainers issue in light of the documentation that the defendant attaches to his application for leave to appeal and motion in this Court" is an exercise of this discretion. *Swafford, supra*, 480 Mich 881. Therefore, we will consider these documents in our opinion in this case.

office that it had not yet received certain Interstate Agreement on Detainers (IAD) forms and warned the office that almost half the 180-day period in which the office could bring defendant to trial after receipt of defendant's request for final disposition had elapsed. On June 15, 2005, the prosecutor apparently signed a certification "in connection with the request for custody," in essence agreeing that defendant would be incarcerated during the pendency of state proceedings and then returned to the federal institution.[3] Defendant also submitted two IAD forms executed in June 2006 with his application for leave to appeal. Form VI indicated that the state would take custody of defendant, and Form VII indicated that the prosecutor's office accepted temporary custody of defendant and would bring defendant to trial "within the time specified in Article III(a) of the Agreement on Detainers."

In a letter dated September 16, 2005, a federal systems inmate manager advised the prosecutor's office that 180 days had elapsed since defendant's request for disposition and that defendant would be notified that he could petition for dismissal of the charges against him. The release authorization of the Bureau of Prisons indicates that defendant was released to state custody on October 5, 2005. Notably, next to "Detainer" a box for "yes" is marked, and "IAD" is typed in the box labeled "method."

The trial court accepted defendant's argument that he was entitled to dismissal of the charges against him based on a violation of the Interstate Agreement on Detainers (IAD), MCL 780.601 *et seq*., and it dismissed the first-degree murder, assault with intent to murder, and felony-firearm charges on January 26, 2006. On March 27, 2007, we issued an unpublished, per curiam opinion reversing the dismissal of charges against defendant and remanding the case to the trial court. Defendant subsequently filed for leave to appeal before our Supreme Court. In the meantime, defendant was tried by a jury and convicted on all charges on September 12, 2007. He was sentenced to life imprisonment on September 27, 2007.

On September 21, 2007, after defendant was convicted but before his sentencing, our Supreme Court issued an order vacating our opinion and remanding "for reconsideration of the [IAD] issue in light of the documentation that the defendant attaches to his application for leave to appeal and motion in this Court." Therefore, in remanding this case, our Supreme Court directed us to consider the documents attached to defendant's filings before our Supreme Court when making our ruling.

II. Analysis

The IAD, MCL 780.601, art III(a), states in pertinent part:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty

[3] Defendant submitted a completed copy of this form with his application for leave to appeal to the Supreme Court. The copy of the form included in the lower court file is not filled in.

> days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for final disposition to be made of the indictment, information or complaint . . . .[4]

In our previous opinion in this case, we cited *People v Monasterski*, 105 Mich App 645; 307 NW2d 394 (1981), and *People v Wilden* (*On Rehearing*), 197 Mich App 533; 496 NW2d 801 (1992), for the proposition that "[t]he IAD does not apply to a person who is incarcerated, but is not actually serving a term of imprisonment, e.g., a person in jail pending trial or a parolee awaiting revocation." We then held that "a detainer filed against a jail inmate before he begins serving a prison sentence is insufficient to implicate the IAD." We concluded that because the IAD was not implicated when the detainer was filed, no violation of the IAD occurred.

In a lengthy concurrence to the Supreme Court order vacating our opinion and remanding for reconsideration of the IAD issue, Justice Corrigan raised the following questions:

> (1) Was the panel correct that *People v Monasterski*, [*supra*], and *People v Wilden (On Rehearing)*, [*supra*], hold that "a detainer filed against a jail inmate before he begins serving a prison sentence is insufficient to implicate the IAD," and, if so, (2) are the holdings in *Monasterski* and *Wilden* consistent with the language of article III of the IAD? [*Swafford*, *supra*, 480 Mich 881.]

After summarizing this Court's holdings in *Monasterski* and *Wilden*, Justice Corrigan noted,

> Because the defendants in *Monasterski* and *Wilden* never began terms of imprisonment before being extradited on the detainers, it appears that those holdings apply only in cases in which the defendant was not imprisoned when he sent to the prosecutor written notice of his place of imprisonment and a request for a final disposition of the indictment, information, or complaint. Article III(a) clearly requires that the defendant be imprisoned at the time he cause the notice to be delivered to the prosecutor. . . . In the instant case, defendant was imprisoned in the federal system after the alleged detainer was lodged. During his imprisonment, he caused written notice of the place of his imprisonment to be delivered to the prosecutor. Thus, *Monasterski* and *Wilden* may be distinguishable from the instant case. [*Id.* at 882.]

Justice Corrigan further noted that if this Court again interprets *Monasterski* and *Wilden* to mean that the IAD never applies when a detainer is filed before imprisonment, then these cases would appear to be inconsistent with article III(a) of the IAD. *Id.* Because article III(a) concerns a detainer that "has been lodged against the prisoner," Justice Corrigan proffered,

> The use of the phrase "has been lodged" in article III seems to mean that the detainer could have been lodged before the defendant was imprisoned. In other

[4] A "state," for purposes of the IAD, includes the United States of America. MCL 780.601, art II(a).

> words, under article III(a), the IAD applies when a defendant who enters into a term of imprisonment has had a detainer lodged against him, whether the detainer was lodged before or during the defendant's imprisonment. [*Id.*]

She also noted that this interpretation is consistent with articles I and IV of the IAD, and that nothing in the IAD requires that the detainer be lodged during defendant's imprisonment for the IAD to apply. *Id.*

However, Justice Corrigan advised that a conclusion that *Monasterski* and *Wilden* are applicable but were wrongly decided would constitute a novel interpretation of article III, resulting in a broader interpretation of the application of the IAD. *Id.* Thus, she requested, "[b]ecause prosecutors up to this point have reasonably relied on the narrower application of the IAD under *Monasterski* and *Wilder* [sic, *Wilden*], the panel should consider whether to give such a holding limited retroactive effect." *Id.* at 882-883.

Although the lower court record includes copies of the Bureau of Prison's letter to defendant informing him of the charges against him and of the bureau's and defendant's communications with the prosecutor's office requesting disposition of the charged offenses, the lower court record does not include a copy of a detainer sent by the prosecutor's office to the prison in which defendant was incarcerated. Accordingly, any determination regarding the manner in which the Bureau of Prisons official who had custody of defendant was informed of the charges against defendant would be based on speculation and the assertions of the parties.

When our Supreme Court, in an exercise of its discretion, expanded the record on appeal in this case, it included in this expanded record a copy of a June 1, 2004, letter from the prosecutor's office to the United States Marshal. This letter requested that the United States Marshal "enter the attached documents as a detainer against this defendant," although it does not indicate what these attached documents are. We were unable to locate, either in the lower court record or in defendant's submissions either to us or to our Supreme Court, any communication from the prosecutor's office to either the Bureau of Prisons or any prison or jail in which defendant was held informing him of the charges pending against him.

However, both defendant and Justice Corrigan assume that at the time defendant requested disposition of his case, a detainer from the prosecutor's office that was cognizable under the IAD was on file with the prison. Apparently, the detainer to which they refer is the one filed by the prosecutor's office with the United States Marshal, which through an unidentified process was sent to the Federal Bureau of Prisons. If we were to assume that this detainer is valid, we would be compelled to find that the provisions of the IAD were violated and that the convictions against defendant must be vacated. Therefore, if we assume that the detainer is valid and adopt Justice Corrigan's analysis, we must conclude that because defendant was imprisoned when he requested that the prosecutor's office expedite the disposition of his case, the prosecutor's office violated the provisions of the IAD when it failed to bring him to trial within 180 days. Under this scenario, the fact that the prosecutor lodged the detainer before defendant was imprisoned would be irrelevant.

Monasterski, *supra*, does not conflict with Justice Corrigan's interpretation of article III(a) of the IAD.[5] The *Monasterski* Court recognized that a letter sent to a sheriff in Elkhart County, Indiana, was consistent with the congressional definition of a detainer, although the defendants had not yet been imprisoned and were held in a county jail pending extradition. *Id.* at 652. After noting that the purpose of the IAD was "to require states to dispose of detainers in an expeditious manner in order to prevent interference with a prisoner's participation in programs of treatment and rehabilitation," the *Monasterski* Court concluded that the IAD did not apply because the defendants were still in the county jail and, therefore, had not yet embarked upon such a program. *Id.* at 652-653.

Further, this Court's holding in *Wilden*, *supra*, is not directly on point. In *Wilden*, *supra* at 538, the defendant argued that his return to a federal correctional facility before his trial on state charges violated the IAD. The *Wilden* Court found that detainers had been filed against the defendant on April 18 and September 21, 1990, when he was in jail under federal custody for an alleged parole violation, but before his parole had been revoked. *Id.* at 538-539. The *Wilden* Court then held that the defendant's transfer from the county jail to a federal correctional facility did not violate the IAD because his parole had not been revoked at the time of the transfer and, therefore, he had not yet entered upon a term of imprisonment. *Id.* at 539. In making this ruling, the Court noted, "The IAD does not apply to pretrial detainees or to parolees awaiting revocation because neither has actually 'entered upon a term of imprisonment.'" *Id.* Further, the *Wilden* Court noted the absence of evidence indicating that defendant was participating in a rehabilitation or treatment program. *Id.* at 540.

In this case, defendant was being held on federal bank robbery charges at the time the prosecutor's office initially filed the detainer with the United States Marshal on June 1, 2004. At this point, the IAD did not apply under *Monasterski* or *Wilden* because defendant was not imprisoned and involved in a rehabilitation or treatment program. However, presuming that the detainer is valid, because the detainer was still pending against defendant when he entered a term of imprisonment and he requested disposition of the charges against him during his imprisonment, the prosecutor's office would have been required to bring him to trial within 180 days of delivery of his request for final disposition. MCL 780.601, art III(a). The IAD would have been invoked when defendant requested disposition of the charges, because at that point a detainer would have been lodged against defendant on an untried pending complaint and, contrary to the situations addressed in *Monasterski* and *Wilden*, defendant was imprisoned at the time he requested disposition.[6] Therefore, if we were to find the detainer to be valid, we would

[5] Regardless, we note that *Monasterski* was issued before November 1, 1990, and therefore is not binding on this Court. MCR 7.215(J)(1).

[6] We note, however, that nothing in the documents that defendant submitted with his application indicate whether he was involved in treatment or rehabilitation programs in federal prison at the time he requested disposition. Because the purpose of the IAD is to "secure[e] speedy trials of persons incarcerated in other jurisdictions" in order to prevent the obstruction of prisoner treatment and rehabilitation programs, MCL 780.601, art I, and defendant was apparently not involved in any such programs, the prosecutor's failure to bring defendant to trial in a timely manner did not undermine the purpose of the IAD. See *Wilden*, *supra* at 540.

be compelled to hold that the prosecutor's office violated the provisions of the IAD when it failed to bring defendant to trial within 180 days of receiving his request for disposition of the charges against him and, consequently, we would be required to vacate defendant's convictions.[7]

However, we conclude that the detainer sent by the prosecutor's office to the United States Marshal on June 1, 2004, did not constitute a valid detainer for purposes of the IAD. The IAD does not define the term "detainer." Nonetheless, in several cases, both this Court and our Supreme Court have adopted a definition of "detainer" set forth in *United States v Mauro*, 436 US 340, 359; 98 S Ct 1834; 56 L Ed 2d 329 (1978). Our Supreme Court has noted, "A detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *People v McLemore*, 411 Mich 691, 692 n 2; 311 NW2d 720 (1981), quoting *Mauro*, *supra* at 359 (internal quotations omitted). See also *Wilden*, *supra* at 537; *People v Shue*, 145 Mich App 64, 70; 377 NW2d 839 (1985); *Monasterski*, *supra* at 651-652; *People v Browning*, 104 Mich App 741, 752; 306 NW2d 326 (1981). The *McLemore* Court also noted the following definition of "detainer" set forth by the Sixth Circuit:

> In *United States v Dixon*, 592 F2d 329, 332, fn 3 (CA 6, 1979), the Court describes a detainer as
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> > simply a notice filed with the institution in which a prisoner is serving a sentence, advising that the prisoner is wanted to face pending criminal charges elsewhere, and requesting the custodian to notify the filing jurisdiction prior to releasing the prisoner. Filing a detainer is an informal process that generally can be done by any person who has authority to take a prisoner into custody. Furthermore, a detainer remains lodged against a prisoner without any action being taken on it.
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> [*McLemore*, *supra* at 692 n 2 (internal quotations omitted).]

In *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993), this Court noted, "While there is no exact definition of the term 'detainer,' it has generally been recognized to mean

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[7] We also note that *Monasterski* and *Wilden* do not stand for the proposition that the IAD is implicated only when a detainer is filed after the defendant has been imprisoned. Rather, they establish that the IAD is not implicated when the defendant is not serving a term of imprisonment when he requests expedient disposition of a case, regardless of the filing of a detainer. Thus, we conclude that a holding by this Court that the IAD applies even when the detainer was lodged before the defendant's imprisonment would *not* be a novel interpretation of article III.

Justice Corrigan directs us to consider *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), for a determination whether our holding should be given limited retroactive effect. However, we need not consider this question because the holdings in *Monasterski* and *Wilden* are consistent with the view that, if the detainer in question is valid, the IAD would apply to this defendant because he invoked it when imprisoned with a pending untried complaint on which a detainer had been lodged.

written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state."

The prosecutor's office never sent a detainer to the Bureau of Prisons, where defendant was serving a sentence; it only sent a detainer to the United States Marshal for the state of Tennessee. The letter that the prosecutor's office filed with the United States Marshal on June 1, 2004, does not meet the definition of "detainer" set forth by this Court and our Supreme Court for the purpose of construing the term as used in the IAD.

All definitions of "detainer" adopted by this Court and our Supreme Court note that a detainer is a notification *filed with the institution in which a prisoner is serving a sentence.* Black's Law Dictionary (8th ed) defines "file" as "To deliver a legal document to the court clerk or record custodian for placement into the official record." However, the lower court record does not indicate, and the parties do not present evidence to establish, that the prosecutor's office delivered a notification indicating that defendant had criminal charges pending against him with any institution in which he was serving a sentence. The prosecutor's office only delivered notice of the charges pending against defendant to the United States Marshal, and the parties present no evidence indicating that the United States Marshal ever oversaw an institution in which defendant served a sentence. Further, the parties provide only scant information indicating how the Bureau of Prisons received notification that defendant had outstanding criminal charges in Michigan.

Because the June 1, 2004, letter was not a notification filed with the institution in which defendant was serving a sentence, it was not a detainer for purposes of the definition we are bound to use when interpreting this term in the IAD. The parties provide no evidence establishing that the prosecutor's office filed notification of the charges pending against defendant with the Bureau of Prisons. Accordingly, the notification that the prosecutor's office sent to the United States Marshal is not a valid detainer and the parties present no evidence indicating that a valid detainer was ever filed. Because no valid detainer was ever filed against defendant, the provisions of the IAD do not apply and the trial court erred when it dismissed the charges against defendant on this basis.[8]

[8] In a footnote in his brief on appeal, defendant asserts that there is no distinction between the United States Marshal and the Bureau of Prisons, suggesting that they are both part of the Department of Justice. To the extent this might be construed as an argument that the detainer was therefore lodged with the Bureau of Prisons, it has no merit. In 28 USC 566(b), Congress provided:

> The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in that district, and of the Court of International Trade holding sessions in that district, and may, in the discretion of the respective courts, be required to attend any session of court.

Thus, the United States Marshal is an agent of the courts, not of the Justice Department or the Bureau of Prisons.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Donald S. Owens